BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Space Station Licensing Rules and Policies	)	IB Docket No. 02-34
	)	
2000 Biennial Regulatory Review – Streamlining and Other Revisions of Part 25 of the Commission's Rules Governing the Licensing of, and Spectrum Usage by, Satellite Network Earth Stations and Space Stations	)	IB Docket No. 00-248

REPLY COMMENTS OF TELEDESIC LLC

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SUMMARY

After considering the initial comments, Teledesic is more convinced than ever that a modified version of the first-come, first served licensing system – referred to herein as a "processing queue" system – offers tremendous promise to simplify and improve the satellite licensing process by providing for swift action on applications and returning ultimate responsibility for successful sharing to the industry. It is time for the Commission to reward timely and well-prepared applications to provide new satellite services to the public with a license within a reasonable period of time, rather than condemning them to a three-ring processing round circus where all comers filing within a filing window have equal rights but inevitably unequal levels of commitment to building.

The Commission's authority to adopt a processing queue system is manifestly clear. Neither the Communications Act nor any binding legal precedent, including the widely cited but endemically misunderstood *Ashbacker v. FCC*, mandates that applicants have a right to file mutually exclusive satellite applications or that the Commission has an obligation to affirmatively seek them out as has been the practice under the failed processing round licensing approach. Processing queues with instant cut-offs are neither novel nor radical and should the Commission determine based on its inquiry in this rulemaking that a change would serve the interests of the public by improving the licensing process, that decision would be entirely consistent with its authority under the Administrative Procedure Act.

Under the current processing round approach, those filing satellite applications have one of three motives. First and ideally, some applicants will file because they are serious about proceeding to design, launch, and operate a viable system. Second, some applicants will file because they *may* want to operate a system someday and they do not want to be frozen out of a

future opportunity to do so even though they have no present plans to go forward with such a system. Third, some applicants will file because they would like to slow down the licensing process for a competitor. The processing round system in current operation tolerates all three rationales for filing and rewards all three with the opportunity to be licensed. The result is that applications falling in categories two and three make up an alarmingly large percentage of the pool and significantly reduce the prospects for quick licensing for real systems.

A modified version of the Commission's first-come, first-served proposal has the potential to eliminate the "slow-down" motive and sharply curtail the "maybe someday" motive and raise the overall quality of satellite applications submitted to the Commission for consideration. However, to be successful, the processing queue approach will require the Commission to commit to three important policy prescriptions: 1) eliminate any provision for holding applications in abeyance, 2) maintain a single queue, and 3) establish an instant-cut-off. The Commission should also eliminate once and for all the failed financial qualification standards and anti-trafficking rules. Neither of these policies has been coherently applied nor is there any available evidence that they have contributed to screening out incompetent or uncommitted applicants. Instead they have been reduced to swords utilized by entrenched interests to needlessly bog down the processing of licensing systems or allowing their orderly transfer.

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Teledesic submits these Reply Comments in response to comments filed on June 3, 2002 on the Notice of Proposed Rulemaking in the above-referenced proceeding.[1] Sadly and predictably, the Commission's much-needed proposal to streamline and improve its satellite licensing procedure was met with reflexive opposition. Despite warnings that a processing queue system would have dire consequences for the U.S. satellite industry, the initial comments contain virtually no analysis of the incentives built into the rival licensing proposals. Attention to the incentive structures is essential if the Commission is to have any basis for its predictive judgment about the likely results of reform. After considering the initial comments, Teledesic is more convinced than ever that a modified version of the Commission's "first come, first served"

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1 *Amendment of the Commission's Space Station Licensing Rules and Policies and 2002 Biennial Regulatory Review*, Notice of Proposed Rulemaking, IB Docket Nos. 02-34 and 00-248, 2002 FCC LEXIS 1033 (rel. Feb. 28, 2002) ("NPRM"). Comments were submitted on June 3, 2002 by the following: The Boeing Company, Cellular Telecommunications & Internet Association, Final Analysis Communications Services, Inc., Hughes Network Systems, Inc. and affiliates, Intelsat LLC, PanAmSat Corporation, Pegasus Development Corporation, Satellite Industry Association, SES Americom, Inc., Teledesic LLC, and Telesat Canada.

proposal – referred to herein as a "processing queue" system – offers tremendous promise to simplify and improve the satellite licensing process by providing for swift action on applications and returning ultimate responsibility for successful sharing to the industry. It is time for the Commission to reward timely and well-prepared applications to provide new satellite services to the public with a license within a reasonable period of time, rather than condemning them to a three-ring processing round circus where all comers filing within a filing window have equal rights but inevitably unequal levels of commitment to building.

Before considering what divides the commenters, it is useful to consider that there is widespread agreement with the basic premise of the NPRM: that although the Commission's satellite licensing process was successful in the past, it needs improvement to remain successful in the future.[2] Thus, although the prescriptions for resolving the present ills may vary among the commenters, there is general agreement that the satellite licensing process should discourage speculation and other types of anti-competitive behavior, avoid undue administrative complexity, and, most importantly, facilitate prompt licensing. A processing queue system is the best way to achieve these goals.

Even the most stalwart defenders of the processing round licensing regime acknowledge that it is fraught with delay "attributable to the sheer size and difficulty of the proceedings"[3] but

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2 *See, e.g.,* Boeing Comments at 2 (acknowledging that "[I]mprovements are needed in the Commission's process for licensing satellite networks. In recent years, the licensing of networks in some satellite services has slowed appreciably."); Final Analysis Comments at 1-2 (commending Commission for examining ways to streamline the process and thereby reduce time necessary to award licenses, facilitate participation of U.S. satellite systems in the global market, and ensure the U.S. will be able to continue to meet ITU obligations); Intelsat Comments at 2 (noting that it shares Commission's concerns about the economic costs on society associated with licensing delays, increasing risk of non-compliance with ITU procedures, and spectrum lying fallow and that observing that "the existing satellite licensing process – once appropriate – may no longer be best suited to the technologically advanced, new satellite services of today"); SIA Comments at 2-3 (acknowledging that the processing of some applications and the completion of processing rounds for certain satellite services has been too protracted and that "these delays may have hindered the timely deployment of service to consumers and impaired the satellite business").

3 Hughes Comments at 3.

remain unwilling to acknowledge that the wholly unnecessary complexity of the current system produces far more than "marginal problems" that "demand remedies at the margins."[4] Although Teledesic agrees with little else in their comments, Teledesic agrees with the Satellite Industry Association[5] that "The Commission's use of processing rounds, combined with its licensing of space segment, has provided certainty and reliability to satellite operators . . . ."[6] Unfortunately, it is that incumbents can reliably use the application process to delay new technologies, and that the resulting delays are certain to last for years.

I. THE LEGALITY OF A PROCESSING QUEUE SYSTEM IS WELL ESTABLISHED UNDER THE COMMUNICATIONS ACT, CASE LAW, AND COMMISSION PRECEDENT.

Only one commenter – Hughes – even suggests that an instant cut-off, or processing queue licensing system, is contrary to law. But it does so with the open throttle of a threatened incumbent. It is not surprising, then, that it grasps at every possible legal authority, and it misreads that authority to support propositions long settled against its position.

Hughes makes three primary arguments. First, it argues that because a processing queue licensing system is not expressly listed in the Communications Act as a permissible licensing scheme, the Act must preclude it. Next, it distorts the Supreme Court's holding in *Ashbacker*[7], which addresses the methodology for *resolving* mutually exclusive applications, to suggest a requirement that the Commission *affirmatively seek* mutually exclusive applications. Finally, it skips over a multitude of examples of "first-come, first-served" licensing previously and

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4 Hughes Comments at 8.

5 Teledesic is member of SIA but as is made clear in these comments, Teledesic does not associate itself in any way with SIA's comments filed on June 3, 2002.

6 SIA Comments at i.

7 *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

presently used by the Commission and proffers that use of an instant cut-off in satellite licensing proceedings would be arbitrary and capricious under the Administrative Procedure Act.

Curiously, Hughes seems not to recognize that its arguments against a processing queue system apply with equal force to the processing round system that Hughes supports. That is, if the Commission must give comparative consideration to *all* applications, then cutting off five or six applications at a time is no more legally appropriate than cutting them off one by one. Fortunately, Hughes's legal arguments are wrong, so the hundreds of recipients of satellite licenses granted after a cut-off notice may rest easy about the validity of their licenses.

A. Far From Dictating Comparative Hearings, the Communications Act Vests the Commission with Considerable Discretion in the Licensing of Non-Auctionable Services

Contrary to Hughes's assertion, the Communications Act does not prescribe an exclusive list of licensing methodology. Hughes describes the Commission's options for licensing as "well defined, and extremely limited."[8] This is simply wrong.

Before characterizing the statute's effect, a close analysis of its language is warranted. Section 309, "Application for license," subsection (a), "Considerations in granting application," establishes as follows:

> Subject to the provisions of this section, the Commission shall determine, in the case of *each application* filed with it to which section 308 applies, whether the public interest, convenience and necessity will be served by the granting of such application, and, if the Commission . . . shall find that the public interest, convenience and necessity would be served by the granting thereof, it shall grant such application.[9]

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8 Hughes Comments at 11.

9 47 U.S.C. § 308(a) (emphasis added). Likewise, Section 307, "Licenses," subsection (a), "Grant," provides that "[t]he Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefore, a station license provided for by this Act." 47 U.S.C. § 307(a).

Without qualification, the touchstone of the "public interest, convenience, and necessity" guides the Commission in all licensing decisions. The next three subsections, (b)-(d), address the time required prior to the grant of an application and allow interested parties to file petitions to deny the application. Subsection (e) addresses "hearings; intervention; evidence; burden of proof," within the context of any application filed under the section. It provides, in relevant part, as follows:

> If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing . . . .

The remaining subsections of Section 309 authorize temporary operations; permit classification of applications and amendments (*e.g.,* major or minor); establish conditions of licensing (*e.g.,* no vested right in the license); permit the use of random selection (lotteries) to resolve certain mutually exclusive applications; require the use of competitive bidding (auctions) to resolve mutually exclusive applications under limited circumstances; and set standards for the renewal of broadcast licenses.

Hughes's statutory argument is twice flawed: first it argues statutory limitations based upon a factual scenario that even it recognizes will not exist under the proposed licensing scheme. Next, it confuses statutory language regarding substantive qualifications with procedural requirements governing the processing of applications.

At the outset Hughes argues that Section 309 "provides exactly three ways by which the Commission may award licenses among mutually exclusive applicants."[10] Taken word for word, this is not inaccurate. *But note the important qualification*: Hughes references licensing

[10] Hughes Comments at 9. Hughes explains that these methods are lotteries or auctions, where appropriate under the statutory criteria, or a public interest determination with a comparative hearing pursuant to Section 309(e).

where mutually exclusive applications exist. Indeed, it discusses this scenario intermittently for fourteen pages. Remarkably, from the midst of the verbiage emerges Hughes's critical recognition: "Under the first-come licensing proposal in the *Notice*, . . . no satellite application would ever be mutually exclusive to any other satellite application."[11] Precisely. And, as such, Hughes's lengthy discussion of the procedural constraints upon Commission action when resolving mutually exclusive applications is inapposite to the issues under consideration. Section 309(a) calls for the Commission to make a public interest determination "in the case of each application," and a processing queue system does just that, while avoiding the delay and encumbrance of mutual exclusivity.

At times, however, Hughes forgets these concessions and embraces a bolder theory, albeit one premised on a misunderstanding of the statute. Abandoning the scenario of mutual exclusivity, Hughes now categorically states that "[t]he Communications Act spells out in exquisite detail the three methods by which the Commission may award licenses: by lottery, by auction, or by public interest determination."[12] This statement confuses the substantive *standard* for licensing with the permissible procedural methods for selecting among otherwise qualified but competing applications.

As the language quoted above indicates, Section 309 provides that the consideration governing *all* licensing decisions ("*in the case of each application filed*") is whether the "public interest, convenience and necessity" would be served by grant of the application. The universality of this standard is apparent even where the statute specifies two particular licensing

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11 Hughes Comments at 13.

12 Hughes Comments at v.

methods for use under certain circumstances. Accordingly subsection (i), "random selection,"[13] provides for the licensing of noncommercial, educational broadcast stations via lottery, but still requires application of the same substantive standard: "[n]o license or construction permit shall be granted to an applicant selected pursuant to [the Commission's general lottery authority] unless the Commission determines the qualifications of such applicant pursuant to subsection (a) [Section 309(a)]."[14] Likewise, subsection (j), mandating the use of auctions under certain circumstances, also requires a public interest determination pursuant to subsection (a) prior to the grant of a license to an auction winner. To paraphrase Hughes, to describe lotteries, auctions and public interest determinations as three independent and exclusive means of licensing is like describing Fujis, Red Delicious and hot dogs as three types of apple.[15]

Thus the statute establishes a single substantive standard for all cases, the "public interest," which every successful applicant must meet in order to become a licensee. Auctions and lotteries are not alternatives to this standard, but rather two possible methods for selecting among otherwise qualified but mutually exclusive applications in certain circumstances not applicable here.[16]

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13 Congress has limited the Commission's lottery authority to resolution of applications for noncommercial educational broadcast stations and public broadcast stations. 47 U.S.C. § 309(i)(5).

14 47 U.S.C. § 309(i)(2).

15 *See* Hughes Comments at 20.

16 Interestingly, while chronicling the ways in which "the Commission's auction authority is highly constrained," Hughes overlooks the fact that Congress expressly qualified that grant of authority with an "obligation in the public interest to avoid mutual exclusivity." Section 309(j)(1), "Use of competitive bidding, General authority," begins: "If, *consistent with the obligations described in paragraph (6)(E)*, mutually exclusive applications are accepted . . . the Commission shall grant the license . . . through a system of competitive bidding . . . ." Paragraph (6)(E) provides that "Nothing in this subsection . . . shall – be construed to relieve the Commission of *the obligation in the public interest* to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means *to avoid mutual exclusivity in application and licensing proceedings.* 47 U.S.C. § 309(j)(6)(E) (emphasis added). Of course, licenses for international satellite communications are exempt from the Commission's auction authority. 47 U.S.C. § 765f. Nonetheless this language is informative of Congress's general judgment that the public interest is best served by the use of licensing methods that seek to avoid the creation of mutual exclusivity.

Once the statute is properly read as calling for a public interest determination on all satellite applications, Hughes's statutory argument is largely incoherent. Section 309(e) provides for the requisite public interest determination to be made at a formal hearing in some circumstances (where a "substantial and material" factual issue remains, or where the Commission is unable to conclude that grant of an application is in the public interest), but there is certainly no requirement that a hearing be used in every non-auction, non-lottery case.[17] And beyond the circumstances compelling a hearing or an auction, or permitting a lottery, the statute is silent about precisely how the Commission should proceed in processing applications and making its public interest determination. A decision to process individually, on a first-filed basis, or to process collectively, through a filing window, formal hearing or other means, is left by the statute to the discretion of the Commission.[18] Contrary to Hughes's assertion, when an application is not mutually exclusive with another, and where there are no material questions of fact, the means by which the Commission arrives at its public interest determination are solidly within the discretion of the Commission.

B. *Ashbacker* and Its Progeny Apply to Actual (Not Potential) Competing Applications and Do Not Constrain the Commission's Ability to Adopt Administrative Rules

Hughes's second argument – that "a first-come licensing scheme would run directly afoul of the *Ashbacker* requirement that the Commission not grant one of two mutually exclusive applications without holding a comparative hearing"[19] – again fails to heed its own concession that by following an instant cut-off procedure, the Commission will not be confronted with

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17 Hughes also equates a "public interest determination" with a hearing. *See, e.g.,* Hughes Comments at 11 (describing the "standard licensing method" as a "public interest determination based on hearings"). The public interest standard cannot be equated with hearings, and the statute clearly does not require hearings in every case.

18 *See* 47 U.S.C. § 309(r).

19 Hughes Comments at 8.

mutually exclusive applications. In truth, the Supreme Court and the U.S. Court of Appeals for the District of Columbia Circuit long ago settled the unremarkable proposition that the Commission may adopt rules governing the processing of applications as "necessary for the orderly conduct of its business."[20] What is more, the courts have expressly recognized the validity of the cut-off as a "reasonable and necessary" means of avoiding the chain-reaction filings triggered by *Ashbacker*'s comparative hearing requirement.

Ashbacker involved two applications that were mutually exclusive of each other. The Commission granted one and, because it could not then grant the other, followed Section 309(e)'s mandate and simultaneously designated the second for hearing. The Supreme Court found the designation an "empty thing" because under no scenario could the second application be granted. Accordingly, the Court held that where two or more mutually exclusive applications exist, Section 309(e) affords the applicants a right to a comparative hearing before one is granted precluding the others.

The Court was clear about the reach of its ruling. It advised: "We hold only that where two *bona fide* applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him."[21] The Court emphasized that its decision was one about the process rather than merits of the decision between two applications – a process, in this case, directed by the statute. The Court signaled, however, that procedural regulations for the "orderly administration" of applications are entirely appropriate.[22] It also referenced its decision in *FCC v. Pottsville*, where it held, with direct relevance to the question now before the Commission:

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20 *U.S. v. Storer Broadcasting Co.*, 351 U.S. 192, 202 (1956) (*"Storer"*).

21 *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 333 (1945) (*"Ashbacker"*).

22 *Id.* at 333 n.9.

> Necessarily . . . the subordinate questions of procedure in ascertaining the public interest, when the Commission's licensing authority is invoked – the scope of the inquiry, whether applications should be heard contemporaneously or successively, . . . and similar questions – were explicitly and by implication left to the Commission's own devising, so long, of course, as it observes the basic requirements designed for protection of private as well as public interests. [23]

Thus, far from Hughes's assertion that "first-come, first-served" is illegal because it is not expressly listed as an option in the statute, the Supreme Court has unequivocally observed that the statute vests the Commission with discretion to adopt application procedures as necessary for the orderly administration of its business. One such possible application procedure is a processing queue with an instant cut-off.

Subsequent cases have clarified both the scope of *Ashbacker* and its relationship to the Commission's adoption of procedural regulations. Not surprisingly, the Court of Appeals has indicated what it terms a "foundational requirement" of existing mutually exclusive applications before *Ashbacker* will be deemed to apply: "*Ashbacker*'s teaching applies not to prospective applicants, but *only to parties whose applications have been declared mutually exclusive.*"[24] As Hughes admits that mutually exclusive applications will not be accepted under the Commission's proposal, its *Ashbacker* arguments are irrelevant.

Hughes attempts a second *Ashbacker* argument: that by proposing a procedure that would avoid the filing of mutually exclusive applications, the Commission is staging an "end-run

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[23] *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). In *Pottsville* the respondent/applicant had successfully appealed the Commission's denial of a construction permit for lack of financial qualifications. On remand, the Commission designated respondent's reinstated application for a comparative hearing with two competing applications filed in the period after its original denial. Reviewing the "public convenience, interest or necessity" standard of Section 307 (governing applications for construction permits filed under Section 319), the Court found that Congress had specified neither procedure nor priority for application of the standard and, accordingly, such questions are committed to the Commission's discretion.

[24] *Reuters Ltd. v. FCC*, 781 F.2d 946, 951 (D.C. Cir. 1986) (emphasis in original).

around the mandates of *Ashbacker* and Section 309."[25] Yet nowhere do the statute or *Ashbacker* indicate either an applicant's right to file a mutually exclusive application or an obligation by the Commission to affirmatively seek them out. To the contrary, in a series of cases challenging application cut-off rules as violative of *Ashbacker*, the court has "approve[d] the device of cut-off as a reasonable and necessary limitation on the statutory right to a comparative hearing."[26]

Indeed, cut-off rules were adopted in large part to address the problem of late-filed competing applications specifically created by *Ashbacker* and the Section 309 hearing requirement. In *Ranger v. FCC*, the court explained that *Ashbacker* "created some very practical and difficult administrative problems. . . . Obviously, if all valid conflicting pending applications must receive a comparative hearing, late filings create procedural difficulties."[27] The court affirmed the Commission's dismissal of an application that could not be refiled in time to be considered mutually exclusive with two other pending applications. The court comfortably observed that "procedural requirements may and do occasionally affect substantive rights."[28] The court rejected the argument that the cut-off violated *Ashbacker*, noting that "[s]ome such rule was necessary to meet the problems created by the *Ashbacker* doctrine, and the manner of coping with the difficulty lies with the discretion of the Commission, so long as its solution is reasonable."[29]

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25 Hughes Comments at 13.

26 *Radio Athens v. FCC*, 401 F.2d 398, 400-01 (D.C. Cir. 1968) (tying the "genesis of the cut-off rule" to the Supreme Court's approving reference in *Ashbacker* to regulations governing the filing of applications for "orderly administration.")

27 *Ranger v. FCC*, 294 F.2d 240, 243 (D.C. Cir. 1961).

28 *Id.* at 244.

29 *Id.*

Hughes overlooks these cases and argues instead that *ARINC*[30] is controlling for the proposition that the Commission may not "avoid the hearing requirement of Section 309(e) and *Ashbacker*."[31] *ARINC* involved a review of the Commission's decision to issue a single consortium license rather than one or more individual licenses for the MSS spectrum in the L band. Despite Hughes's lengthy discussion, its analysis suffers from its characteristic flaw: the Commission imposed the consortium requirement *after accepting and as an attempt to resolve* 12 competing applications.[32] The court recognized these twelve as "*bona fide* and mutually exclusive" applications, thereby satisfying the threshold requirement of *Ashbacker.* The court reversed and remanded, explaining that "the Commission's adoption of the consortium requirement in this case precluded applicants from prosecuting their individual applications at all."[33]

Far from controlling, *ARINC* bears no resemblance to the Commission's proposal now under consideration: rather than resolving a pile of existing, conflicting applications, the

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30 *Aeronautical Radio Inc. v. FCC*, 928 F.2d 428 (D.C. Cir. 1991)("*ARINC*").

31 Hughes Comments at 13. At the same time Hughes charges the Commission with "seriously misread[ing] *Storer* to suggest that case can somehow validate a licensing scheme that awards a license to one of two mutually exclusive applicants without a comparative hearing." *Id.* at 12-13. The Commission has done no such thing. The paragraph in the *NPRM* cited by Hughes does not even refer to treatment of mutually exclusive applications. Rather, the Commission cites *Storer* for the simple proposition that Section 309 does not require it to consider applications that are inconsistent with its rules. *NPRM* at ¶ 64. *Storer* involved a review of the Commission's broadcast multiple ownership rules. Though intended to limit concentration of ownership, the rules had the related effect of dictating the rejection of subsequent applications by a licensee who had already reached the ownership cap. The Court found that the applicant was not denied a "full hearing" in violation of *Ashbacker* merely because a substantive regulation had an outcome–determinative effect upon its license application.

32 *Amendment of Parts 2, 22 and 25 of the Commission's Rules to Allocate Spectrum For, and to Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service*, Second Report and Order, 2 FCC Rcd 485 (1987). At the time of the notice of proposed rulemaking in 1985, the Commission established an application cut-off date simultaneous with the filing of comments on the proposed allocation and service rules. Twelve applications were received. *Id.* Two years later, the Commission adopted the consortium license requirement and afforded each qualified applicant of record the opportunity to participate after making an initial cash contribution of $5 million, as demonstration of financial qualification. *Id.* at 491 ¶ 44.

33 *ARINC*, 928 F.2d at 451.

proposed rule will apply prospectively, to future-filed applications, and it will not foreclose anyone from filing or prosecuting an application at any time. What it will do is make clear that any applicant that chooses to file an application must either engineer a way to coexist with previous licensees or prepare for swift rejection. To the extent that an application raises concerns about its potential impact on the prospects for future competition, as Teledesic noted in its original comments,[34] any member of the public may file a petition to deny or comments documenting its concerns. Moreover, such concerns could also be addressed in a service rule proceeding.

C. Adoption of an Instant Cut-Off Is Consistent with Long-Established Commission Precedent and Is a Rational Response to the Problems the Commission Has Identified

Ironically, Hughes ignores the fact that the Commission *today* uses "first-filed" licensing for some services.[35] Hughes's arguments would render these practices illegal, too.

Processing queues and instant cut-offs are nothing new. When the Commission initiated a proceeding to implement its revised auction authority in 1999, it noted that its traditional approach to the licensing of private wireless spectrum generally avoided the filing of mutually exclusive applications because frequencies are assigned on a first-come, first-served basis and/or are frequency-coordinated or shared.[36] Earlier, when the Commission first adopted its competitive bidding procedures, it exempted certain SMR and PCP frequencies from auction,

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34 Teledesic Comments at 10-13.

35 *See, e.g., Amendment of the Commission's Rules Regarding Multiple Address Systems,* Report and Order, 15 FCC Rcd 11956, ¶ 45 (1999) (retaining first-come, first-served licensing in the 928/952/956 MHz bands). *See also, Implementation of Sections 309(j) and 337 of the Communications Act of 1934,* Notice of Proposed Rulemaking, 14 FCC Rcd 5206 (1999) ¶ 13 and n. 13.

36 *Implementation of Sections 309(j) and 337 of the Communications Act of 1934*, Notice of Proposed Rulemaking, 14 FCC Rcd 5206, 5216 ¶ 13 (1999). The original grant of auction authority in 1993 categorically excluded private services through the requirement that competitive bidding be used only for subscriber-based services.

noting that "we will not depart from existing first-come, first-served practices which work to avoid mutual exclusivity at this time."[37]

Because "first-come" processing has been around for so long, the Commission has previously been presented with, and has rejected, the arguments Hughes recycles today. For example, in 1988 the Commission re-examined licensing procedures for the private fixed microwave service.[38] The Commission had been allowing 30 days from the issuance of public notice of an application for the filing of mutually exclusive applications. It proposed to reduce that period to one day: "In other words, we propose that frequencies would be issued on a first-come, first-served basis, unless two applications were received on the same day for only one available channel."[39] The Commission considered the implications of *Ashbacker* but noted that "the Court did not address how to determine mutual exclusivity in the first place, thus in no way restricting the Commission's decision."[40] That discretion, it concluded, allows it to "choose any reasonable filing period it believes appropriate, as long as that period is clear and unambiguous and all applicants are treated equally."[41]

The Commission also has previously rebuffed Hughes's suggestion that potential applicants have a right to file mutually exclusive applications.[42] In an order reconsidering a new MMDS cut off rule, the Commission rejected the argument that a one-day cut-off "violated the

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37 *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Second Report and Order, 9 FCC Rcd 2348, 2351 ¶ 16 (1994).

38 *Amendment of Part 94 of the Rules Regarding Point to Multipoint Use of the 2.5, 10.6 and 18 GHz Bands of Private Operational Fixed Microwave Licenses*, Notice of Proposed Rulemaking, 3 FCC Rcd 3532 (1988).

39 *Id.* at 3536 ¶ 38.

40 *Id. at* ¶ 40.

41 *Id.*

42 Of course, interested parties do have standing vis-à-vis the first filer. Section 309(d) allows a party in interest to file a petition to deny an application where it can plead specific allegations of fact to show that grant of the application would not be in the public interest. But this procedural right to participate in an applicant's public interest determination does not equate with a right to file a competing application with equal priority.

Communications Act in that it effectively deprives MMDS applicants from filing mutually exclusive applications."[43] The Commission simply observed that "[n]othing in the Communications Act . . . nor in any of [the] cited case law, requires that a mutual-exclusivity cut-off period be of a certain duration," and it provided examples of the many services then operating under a one-day cut-off.[44]

Hughes's contention that first-come, first served processing would be a radical reversal in the wake of DISCO I is unimpressive. The consideration of processing rounds in the DISCO I Reconsideration Order, to which Hughes refers in its comments[45], involved a claim that the Commission failed to observe the notice requirements of the Administrative Procedure Act when it decided to apply the consolidated processing round licensing model already in place for domestic satellite systems to international satellite systems.[46] The Commission decided that its announcement in the DISCO I NPRM that it intended to apply the same regulatory policies to both international and domestic satellite systems provided the public with sufficient notice of the Commission's proposed change in the rules.[47] The Commission also noted that "processing rounds *in the past* helped to identify and resolve mutually exclusive applications by freezing the number of applications to be processed at a particular time."[48] This observation adequately explained the Commission's reasons for applying the domsat procedures to separate systems in 1997, but it was hardly a fresh commitment to continue using processing rounds in the future as

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43 *Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing the Use of Frequencies in the 2.1 and 2.5 GHz Bands*, Order on Reconsideration, 1991 FCC LEXIS 6853, 6860 (1991).

44 *Id.* at 6862-6863 ¶ 162.

45 Hughes Comments at 21.

46 *Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems and DBSC Petition for Declaratory Rulemaking Regarding the Use of Transponders to Provide International DBS Service*, Second Order on Reconsideration, 16 FCC Rcd 15579 ¶ 27 (2001) (the DISCO I Reconsideration Order).

47 *Id.*

48 Id. at ¶ 29. (emphasis added).

suggested by Hughes. DISCO I involved the amalgamation of two different licensing regimes, and the fact that the Commission picked one of them over the other does not prevent the Commission from adopting a third regime now that it is better than either of the earlier ones.

Hughes's reliance on the DISCO I Reconsideration Order is rather surprising given that the Commission's decision to license international satellite systems by means of processing rounds was challenged in a petition for reconsideration filed by Hughes's affiliate, PanAmSat. Specifically, as noted by the Commission in the Reconsideration Order, one of the concerns raised against processing rounds by the petitioners to deny was that their use would unduly delay the authorization of satellite systems seeking to provide international services.[49] PanAmSat's erstwhile prediction about delay has been borne out, which makes it ironic that PanAmSat now finds processing rounds so vital.

In any event, it is well-settled that the Commission, like other Federal agencies, has the authority to change its procedures in a rulemaking, as long as it provides a reasoned explanation for doing so.[50] The U.S. Court of Appeals for the District of Columbia Circuit has emphasized that "flexibility is necessary to allow agencies, particularly the FCC, to respond to rapidly changing 'technological, commercial and societal aspects of the . . . industry' as they fulfill their delegated duties."[51] Based on the record and on its unique expertise in satellite licensing, the Commission would be well within its authority under the Administrative Procedure Act to adopt a processing queue licensing process as proposed in the NPRM.

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49 Id. at ¶ 30.

50 *Committee for Effective Cellular Rules v. FCC*, 53 F.3d 1309, 1317 (D.C. Cir. 1995); Florida Cellular Mobil Communications Corp. v. FCC, 28 F.3d 191, 196-197 (D.C. Cir. 1994), *cert. denied, 115 S. Ct. 1357* (affirming change in rules as reasoned response to Commission experience); *Rainbow Broadcasting Co.* v. FCC, 949 F.2d 405, 409 (D.C. Cir. 1991) (emphasizing "wide latitude" afforded agencies to change their policies through rulemaking)

51 *Committee for Effective Cellular Rules,* 53 F.3d at 1317 *citing Rainbow Broadcasting*, 949 F.2d at 409.

II. A PROCESSING QUEUE APPROACH WILL PRODUCE THE APPROPRIATE INCENTIVES TO ENCOURAGE "REAL" APPLICATIONS

Most of the comments filed on June 3, 2002, focus on predictions of future conduct by applicants, and are therefore incapable of being as decisively wrong as Hughes's legal arguments. Nonetheless, even in the realm of predictions, the Commission must insist that commenters base their predictions on some reasonable chain of inference. Two common predictions about the processing queue approach – namely that (A) it will produce an avalanche of speculative and "blocking" filings and that (B) it will require the Commission to grant poorly prepared, "low quality" applications – turn out upon inspection to have no visible means of support.

A. Processing Queues Will Reduce Incentives for Speculative and Blocking Applications.

One way of predicting the number of applications that might be filed under any licensing system is to look at the number of different incentives that might induce an applicant to file. Under the current processing round approach, there are three main motives. First and ideally, some applicants will file because they are serious about proceeding to design, launch, and operate a viable system. Second, some applicants will file because they *may* want to operate a system someday and they do not want to be frozen out of a future opportunity to do so even though they have no present plans to go forward with such a system. Third, some applicants will file because they would like to slow down the licensing process for a competitor. The processing round system in current operation tolerates all three rationales for filing and rewards all three with the opportunity to be licensed. The result is that applications falling in categories two and three make up an alarmingly large percentage of the pool and significantly reduce the prospects for quick licensing for real systems. A processing queue will address this problem directly, by

completely eliminating the "slow-down" motive and sharply curtailing the "maybe someday" motive.

The most resounding concern about the processing queue licensing proposal revealed in the comments is that it would inevitably give rise to a "land rush mentality," *i.e.* rampant speculation.[52] Although there are alternative theories about which groups of potential applicants would be most inclined to speculative scheming under a processing queue licensing system,[53] Hughes's fear that "nothing will prevent every dentist and lawyer in the United States from jamming up the queue with applications for satellite licenses that they intend only to sell, unbuilt, to an operator"[54] wins the award for most imaginative. Teledesic rather doubts that dentists and lawyers are spending much time crafting dastardly schemes to deprive Hughes of the opportunity to provide valuable service to the public. However, in the interests of preventing a panic, Teledesic respectfully proffers several relatively simple revisions to the Commission's first-come, first-served proposal which will reduce or eliminate incentives to speculation or "blocking."

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52 *See e.g.,* PanAmSat Comments at 5-6 (arguing that first-come, first-served will introduce "speculation and abuse of process" because the "barriers to a license are at a minimum" and that such a process will encourage "parties who file on speculation , seek to block a competitor, or are hoping to extract greenmail"); Boeing Comments at 5 (lamenting that first-come, first-served would entail the issuance of a satellite authorization to any qualified entity that is the first to file for a new assignment, without the addition of necessary safeguards to protect against speculation, adversarial filings, tracking and inefficient spectrum use).

53 Final Analysis, for example, believes, "a first-come, first-served approach creates an incentive for *large and entrenched satellite operators* to file speculative warehousing applications that will be difficult, if not impossible to control despite the protections." Final Analysis Comments at 3 (emphasis supplied). Hughes, on the other hand, expects a crafty group of entrepreneurial types to attempt to cash in under such a licensing regime: "It is an observable fact that greenmail tends not to come from large, well-capitalized corporations (which could meet the Commission's financial qualification requirements.) Greenmail almost always comes from individuals and their small upstart companies that are willing (and may find it necessary) to do anything to make a buck." Hughes Comments at 28.

54 *Id.*

1. Eliminate Any Provision for Holding Applications in Abeyance

First and foremost, *the Commission must abandon any consideration of holding applications in abeyance pending the possible default of a previous licensee.*[55] As Teledesic noted in its initial comments, a processing queue can only achieve its full potential if: (1) the queue is always short enough to provide an opportunity for an operator with firm plans to enter service quickly; and (2) applicants who say they need a resource to be challenged to use it right away. Amassing a large group of understudy actors for successful licensees will simply facilitate a form of speculative warehousing which allows applicants for a particular frequency band to keep their claims alive for years without facing any milestones.

Resisting the temptation to amass a stockpile of second-, third-, and fourth-place contenders for a given license will go a long way to assuaging the concerns voiced by many commenters about potential speculation. For example, many of the comments point to the torrent of applications they believe will be dumped on the Commission upon adoption of a processing queue system.[56] The deluge is likely to be avoided, however, if the Commission makes clear that the onus will be on satellite applicants to ensure that their applications are not mutually exclusive with existing licenses or applications currently on file. Applicants foolhardy enough to continue to pummel the Commission with frivolous applications will learn quickly that failure to perform due diligence on the front end will simply lead to an embarrassing number of application denials and loss of substantial filing fees.

Timely denial of incompatible applications is what will clearly distinguish a processing queue system from the ITU filing process.[57] The ITU process allows administrations to gain a

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55 *See* NPRM at ¶ 34.

56 *See, e.g.,* Hughes Comments at 28 (predicting an overwhelming flood of applications under a first-come, first-served licensing system).

57 PanAmSat Comments at 7.

very durable coordination priority lasting up to seven years, and the priority can be used either to attract a satellite operator in exchange for monetary or other considerations or to block a competitor. The processing queue approach attacks these speculative and "blocking" filings by eliminating the incentive structure that produces them. "Blocking" is essentially eliminated because there is no way to affect a filed application by filing a later one. Furthermore, if system proposals must succeed or fail in no more than eighteen months (six for licensing and twelve for the commencement of construction), there is simply not time for a pie-in-the-sky, "maybe-someday" proposal to suddenly become valuable.

2. Maintain a Single Queue

Second, the Commission must maintain a single queue and assiduously avoid the assumption that complex applications, involving for example feeder links and inter-satellite links in different frequency bands, require multiple queues.[58] Teledesic wholeheartedly agrees with Boeing and SES Americom that piecemeal licensing of portions of complex systems would inevitably increase the delay associated with receiving a complete license from the Commission.[59]

The Commission's proposal to allow multiple queues would be disastrous at a time when increasing technical complexity of satellite proposals is inevitable due to the development of new service models (MSS, NGSOs) and the increasing scarcity of available spectrum. The Commission's repeated reference to a "lead application" is associated with the same flawed assumption that applications will normally form themselves into groups, all for the same service in the same band(s) and all mutually exclusive within the meaning of *Ashbacker*.[60]

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58 *See* NPRM at ¶¶ 38-39; *see also* SES Americom Comments at 8; Teledesic Comments at 14.

59 SES Americom Comments at 8; Boeing Comments at 7.

60 Teledesic Comments at 15.

A single queue processing method should proceed as follows. When a satellite application is received, it will be placed on public notice. In conjunction with comments received from the public, the Commission's licensing decision will be premised on an examination of all of the requested frequency assignments in the application. The license will be granted if it demonstrates compatibility with the existing interference environment based on its filing date, does not unreasonably preclude future applications because of anti-competitive or overzealous spectrum demands, and is otherwise in the public interest. Those applications that do not conform to the existing interference environment or which are otherwise found not to be in the public interest will simply be denied.

One of the most obvious benefits of this type of licensing process is that it will provide applicants with an entirely different set of incentives than those currently prevailing under the existing processing round system – incentives to apply for *assignments that work*, not assignments that might work someday (or assignments that make the Commission work). The corollary to this idea is that the Commission will be able to focus its attention on processing applications as opposed to mediating complicated sharing disputes between mutually exclusive applicants.

3. Establish an Instant Cut-Off

Third, the Commission must *adopt its proposal to treat a single application filed on a given day as a processing* round of one, which would cut off the filing rights of applications filed on a subsequent day.[61] One of the most insidious elements of the current processing round system is its virtual guarantee that any application with serious merit will languish for years in

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[61] NPRM at ¶ 43.

administrative purgatory because of the inevitable filing of speculative and inevitably mutually exclusive applications as result of mandatory filing windows.

Teledesic provided a lengthy explanation of the public interest benefits of an instant cut-off rule in its initial comments, and will not repeat it here.[62] Given the significant concerns about blocking applications that arose in the initial comments,[63] it bears repeating, however, that an instant cut-off rule will all but eliminate the incentive for this sort of behavior given that applicants filing an application for the sole purpose of delaying the expeditious licensing of a potential competitor will no longer be able to demand comparative consideration of their application. It is indeed ironic that the very same commenters who are now so concerned about speculative behavior and blocking ignore the obvious fact that both speculation and blocking are already rampant under the current system. Indeed, the use of long filing windows together with the processing round virtually ensures a high percentage of speculative and blocking applications, because applications stimulated by a cut-off notice are highly unlikely to represent the fruit of years of business plan development rather than a sixty day scramble to gain a lottery ticket that may pay off in the future.

Concerns that an instant cut-off approach would lead to gluttonous spectrum grabbing by first movers[64] are likewise unwarranted. Indeed, allowing the Commission to consider one application at a time would provide much greater freedom to consider incoming applications on their individual merits. The Commission would continue to be obligated to review each application pursuant to Section 309(a) of the Communications Act and could thus continue to

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62 Teledesic Comments at 6-13

63 *See e.g.*, SIA Comments at 23; Hughes Comments at 26.

64 *See e.g*, SES Americom Comments at 7; Hughes Comments at 28-29; Boeing Comments at 8.

deny a request that it deemed to be excessive,[65] grant an application only in part,[66] condition a license on compliance with future rulemakings,[67] grant a license while making clear that co-frequency operations will be authorized in the future,[68] or modify a license in the interest of more efficient spectrum use in the light of technological advances.[69] Of course, taking any of these actions requires the Commission to make firm decisions and articulate clear and principled justifications for them. Some commenters apparently despair of this possibility. But the fact is that the Commission already faces questions of spectrum sufficiency and spectrum excess, and is already called upon to make hard decisions on these matters. Adopting a processing queue – and thereby "de-linking" the many applications on file – will simply give the Commission greater flexibility to address the issues head on.

B. A Processing Queue Approach Will Demand That Applicants File High Quality Applications

Many of the commenters on the NPRM seem to mistakenly believe that adoption of a processing queue licensing approach would be tantamount to repeal of Section 309(a) of the Communications Act. For example, many of the commenters state without explanation that under such a licensing regime, the Commission would be obligated to "grant[] licenses to all comers, however unqualified."[70] This is simply not true as no reform of the licensing process

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65 *E.g., Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service,* 94 FCC2d 129, 137 ¶ 19 (1983).

66 *E.g., Loral Orion Services, Inc.,* 14 FCC Rcd 17665 (Int'l Bur. 1999).

67 *E.g., PanAmSat Licensee Corp.,* 13 FCC Rcd 1405, 1414 ¶ 27 (Int'l Bur. 1997).

68 *E.g., TRW, Inc.,* 11 FCC Rcd 20419, 20425-26 ¶ 24 (Int'l Bur. 1996).

69 *See generally Licensing of Space Stations in the Domestic Fixed-Satellite Service and Related Revisions of Part 25 of the Rules and Regulations*, 54 Rad. Reg. 2d (P & F) 577, 48 Fed. Reg. 40233 (1983).

70 *See, e.g.,* PanAmSat Comments at 2; Boeing Comments at 8 ("a first-come, first-served policy rewards only expedience – not innovation, efficient spectrum design, improved service offers, and most of all, not good engineering."); Hughes Comments at 26 ("presumption that anything filed will be granted as long as it is first in the queue.").

can eliminate the statutory obligation of the Commission to ensure that each application granted pursuant to the Communications Act serves the public interest, convenience and necessity.[71]

Applicants would have incentives to file high quality applications under a processing queue approach for fairly obvious reasons. First and foremost, each application accepted by the Commission would be immediately placed on public notice at which time any member of the public would have an opportunity to file a petition to deny. Filing a poorly prepared application that would likely be quickly denied would be a costly mistake for a serious applicant as it would provide an opportunity for a competitor to usurp any value associated with its application and potentially file a competing application before it was able to file an improved and grantable one. It would also be foolhardy for a purely speculative applicant to file a poorly prepared application that would receive immediate scrutiny from the public and amount to an obvious waste of processing fees. One of the most important and perhaps least obvious elements of this change in licensing policy would be to reduce the Commission's workload in vetting pending applications and return the onus to the private sector to ensure that only the most well-devised applications are filed or at least ultimately successfully licensed.

Second, there will be little incentive to file poor applications that are not grounded in a well-developed business model if Commission successfully shortens the time period between application receipt and grant to between 90 days (as proposed by Intelsat[72]) and 180 days. Eliminating the delay between the application stage and the first milestone will reward applicants prepared to move forward while deterring speculators.

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71 *See* 47 U.S.C. § 309(a).

72 Intelsat Comments at 14.

It is also untrue that a procedural queue would reduce applicants' incentives to include efficient spectrum design and good engineering in their applications as alleged by Boeing.[73] On the contrary, under a processing queue regime, an applicant's failure to demonstrate the ability to share with licensees holding priority would provide instant grounds for denial of the application. By contrast, under the current processing round model no such incentive exists and many of the years of licensing delay are caused by applicants waiting for the Commission to resolve sharing dilemmas between mutually exclusive system proponents.

III. THE COMMISSION SHOULD REVIEW AND ELIMINATE ANCILLARY POLICIES LIKE PRE-LICENSING FINANCIAL QUALIFICATION TESTS AND ANTI-TRAFFICKING RULES WHICH DO NOT SERVE THEIR INTENDED FUNCTIONS.

A. Financial Qualifications Do Not Serve an Effective "Early Warning" Function

Financial qualification standards have long been a favorite policy of entrenched satellite conglomerates eager to screen out pesky new competitors. In almost every proceeding to establish service rules and once again in the comments on the instant NPRM, demands for the strict enforcement of financial standards ring out with promises that such standards "serve a unique 'early warning' function by which the Commission is able, before the license is issued, to identify applicants who are likely to prove unable to construct."[74] These arguments propounded in favor of "winnowing out"[75] applications, rest on a prevalent, albeit false assumption that financial standards would actually succeed in eliminating the right applicants by accurately measuring their level of commitment.

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73 Boeing Comments at 8.

74 Hughes Comments at 44-45.

75 Boeing Comments at 11 (financial qualifications process give the Commission the opportunity to winnow out companies at the application stage. . ."); PanAmSat Comments at 15 ("financial requirements provide an assurance that only applicants having the wherewithal to construct and launch their systems will be eligible for licensing.")

In past practice the Commission did in fact view the ability to produce a healthy balance sheet at the application stage, preferably representing the assets of a single corporate entity, as evidence of such commitment. And indeed, once upon a time, the Commission's assumption that only such an entity could be a realistic candidate to succeed in the satellite business may have been reasonable. However, it has been disproved by subsequent experience, including the high failure rate of licensees who met the standard but never launched satellites and the emergence of a new model for successful satellite endeavors – start-up companies with sound business and technical plans that have the financial support of private investors, and/or subsequently raise significant amounts of capital in private or public markets or both as a result of these plans.

There is no dispute that the successful launch and operation of a satellite system requires a significant commitment of financial resources. Yet, experience shows that use of a major conglomerate's balance sheet in accordance with the traditional financial qualification standard is not an adequate measure of true commitment to proceeding with construction, launch, and operation of a satellite system. A look back at the last fifteen to twenty years of satellite licensing shows that the financial qualifications test that has been most frequently applied is a very poor predictor. It is, in fact, worse than tossing a coin.

The low predictive value of the financial standards is dramatically illustrated by the 1983, 1985 and 1988 C- and Ku-band satellite licensing processing rounds. A review of these three geostationary FSS processing rounds demonstrates that *despite their financial qualifications*, licensees in these rounds exhibited a surprisingly low launch rate. Our review of the publicly available information suggests that only 41% of the licensed systems ever launched. Specifically, of the 19 applicants licensed in the 1983 Round, only 11 actually launched. In the

1985 Round, of the 23 applicants licensed, only three launched. Finally, in the 1988 Round, only 11 of the 19 licensees launched. Thus, notwithstanding their initial showing of their "financial qualifications" to the Commission in their license applications, the successful licensees in these rounds appear to have been no more likely to launch their systems and begin service than applicants who might have relied on outside investors and novel financing techniques.

In empirical terms, the traditional test yields an unacceptable number of "false positives" and "false negatives." Perhaps the best recent example of a "false positive" is TRW's proposed Big LEO system. In its order granting TRW a license on January, 1995, the Commission found that "TRW has submitted substantial evidence to show that it has current assets and operating income sufficient to construct and launch its system, and provided an unequivocal statement that it intends to spend the funds necessary to construct the proposed system. The Commission's rules and policies do not require more."[76] The failure of TRW to implement its licensed Big LEO system illustrates the false premise upon which the financial standards are based. Having a conglomerate's healthy balance sheet does not demonstrate actual commitment of those resources to the launch and operation of a satellite system.

The TRW example stands in sharp contrast to that of EchoStar, which was licensed under the milestone approach embodied in the DBS rules. The most commonly applied financial standard would have yielded a "false negative" for EchoStar. Although it did not begin the licensing process with a robust balance sheet, Echostar's success flows from execution of a savvy business plan which attracted the support of private investors. Applicants like EchoStar must commit significant attention early on in the process to demonstrating their competence – technically, financially, and otherwise – to cautious investors. Rather than relying on a balance

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[76] *Application of TRW Inc. for Authority to Construct, Launch and Operate a Low Earth Orbit Satellite System in the 1610-1626.5 MHz/2483.5-2500 MHz Band*, 10 F.C.C Rcd 2263 (Int. Bur. 1995).

sheet to glide through the licensing process, they must go one step further and actually demonstrate their commitment to the project to skeptical private investors. The type of determination that is necessary to convince both the Commission and private investors of the viability of a proposed system serves as a useful proxy for the amount of skill and determination that will be necessary to implement a proposed system and deliver on promises of commercial success to investors and service in the public interest to the Commission.

To its credit, based on the number of waivers of the standards that have been granted in recent history, in practice the Commission has confirmed that the most commonly applied financial qualifications standard is simply not predictive of success. For example, in 1997 alone, the Commission waived the financial standards in sixteen straight licensing orders.[77] Moreover, the Commission has candidly acknowledged that "current financial ability" should not be a hard and fast requirement for licensing where it can be avoided.[78]

B. Abolishing the Anti-Trafficking Rules is Long Overdue

It is no surprise that the large entrenched satellite interests participating in this comment cycle continue to urge the Commission to retain anti-trafficking rules as a means of deterring speculative behavior.[79] These rules after all rarely inconvenience companies that do not need to

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77 *See Teledesic Corporation*, 12 FCC Rcd 3154 (Int'l Bur. 1997*); Comm Inc.*, 12 FCC Rcd 23001 (Int'l Bur. 1997); *EchoStar Satellite Corporation*, 13 FCC Rcd5664 (Int'l Bur. 1997); *GE American Communications, Inc*, 12 FCC Rcd 6475 (Int'l Bur. 1997); *Hughes Communications Galaxy, Inc.*, 13 FCC Rcd 1351 (Int'l Bur. 1997); *KaStar Satellite Communications Corp.*, 13 FCC Rcd 2387 (Int'l Bur. 1997); *Lockheed Martin Corporation*, 12 FCC Rcd 23014 (Int'l Bur. 1997); *Loral Space and Communications Ltd.*, 13 FCC Rcd 1379 (Int'l Bur. 1997); *Morning Star Satellite Company, L.L.C.*, 12 FCC Rcd 6039 (Int'l Bur. 1997); *Net Sat 28 Company, L.L.C.*, 13 FCC Rcd 1392 (Int'l Bur. 1997); *Orion Network Systems, Inc.*,12 FCC Rcd 23027 (Int'l Bur. 1997); *PanAmSat Licensee Corp.*, 13 FCC Rcd 1405 (Int'l Bur. 1997); *Orion Atlantic, L.P.*, 13 FCC Rcd 1416 (Int'l Bur. 1997); *VisionStar, Inc.*, 13 FCC Rcd 1428 (Int'l Bur. 1997); *Constellation Communications, Inc*, 12 FCC Rcd 9651 (Int'l Bur. 1997); *Mobile Communications Holdings, Inc.*, 12 FCC Rcd 9663 (Int'l Bur. 1997).

78 *See e.g., Rulemaking to Amend Part 1, 2, 21, and 25 of the Commission's rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Service*, 12 FCC Rcd 22310, 22345-46 (1997).

79 *See, e.g.*, SIA Comments at 30; Hughes Comments at 49; PanAmSat Comments at 18.

attract early-stage equity investment; indeed, they serve as a convenient sword *vis-à-vis* entrepreneurial upstarts.

Contrary to the reassurance of SIA in its comments, the Commission's anti-trafficking rules do not include "adequate safety measures to ensure that enforcement of the rules do not inhibit legitimate transactions from taking place."[80] As Teledesic observed in its initial comments, the Commission's satellite anti-trafficking rules simply do not provide a meaningful definition of what trafficking is and therefore leave satellite operators contemplating legitimate investment transactions exposed to false allegations of trafficking.

Although the anti-trafficking rules were never designed to prohibit the profitable sale of a license but rather to discourage speculators from *obtaining* licenses with the *intent* of selling them rather than providing service to the public,[81] the emphasis on speculative intent has at times been lost in the shuffle.[82] Thus, although Hughes is technically correct to note that it would be "absurd to grant a license to some entity based on its identity and service plans – a particularly well-equipped applicant proposing to launch a particularly desirable service – and then allow that entity to freely transfer the license for a profit the next day to a company whose qualifications and objectives have never been reviewed by the Commission,"[83] the absurdity would lie not in the fact that anti-trafficking rules were not applied but in the notion that the public interest determination *could be skipped* in the absence of anti-trafficking rules.

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80 SIA Comments at 29.

81 *See, e.g.*, 47 C.F.R. § 1.1948(i)(1) (defining ULS trafficking as "obtaining or attempting to obtain an authorization for the practical purpose of speculation or profitable resale of the authorization rather than for the provision of telecommunications services to the public or for the licensee's own private use").

82 *See, e.g., Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5 – 29.5 GHz Frequency Band*, Third Report and Order, 12 FCC Rcd 22310, 22339-40 (1997) (referring to "the selling of a bare license for a profit").

83 Hughes Comments at 50.

As Teledesic has noted throughout these comments, none of the licensing reform proposals under consideration by the Commission are intended to or would be capable of diminishing, much less eliminating the Commission's responsibility under Section 309(a) of the Communications Act to ensure that all applications to provide telecommunications services serve the public interest, convenience, and necessity. By the same token and precisely because of its solemn obligation to protect the public interest, convenience, and necessity, when the Commission is presented with evidence that the rules or policies currently in place are not operating successfully, it has an obligation to consider improvements and should implement them.

Respectfully Submitted,

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